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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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CHARLES D. McCORKLE, JR.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.*

Petitioner, Charles D. McCorkle, Jr., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered February 24, 1975, affirming a judgment of conviction against him entered by the United States District Court for the Northern District of Illinois, Eastern Division.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals entered April 8, 1974, is not reported, but is printed in full as Appendix A to this Petition.

The Opinion of the Court of Appeals on rehearing *en banc* entered February 24, 1975, is not reported, but is printed in full as Appendix B to this Petition.

## JURISDICTION

The Judgment of the Court of Appeals was entered February 24, 1975, and petitioner's timely Petition for Rehearing was denied April 1, 1975 (See Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. What is the scope of the "bad purpose or evil motive" which must be found before a person may be convicted of having "willfully" committed an offense under §7203 of the Internal Revenue Code?

2. In a prosecution under §7203 of the Internal Revenue Code, where government witnesses have testified to conversations with defendant containing his admissions respecting the element of willfulness, is defendant entitled to bring out on cross-examination additional parts of the same conversations in which defendant makes declarations concerning his state of mind at the time of the offense?

## STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.) §7203:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of sec-

tion 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

## STATEMENT OF THE CASE

Petitioner was convicted in the District Court, after a jury trial, of willfully failing to file personal federal income tax returns for three calendar years. The trial was limited to the issue of whether petitioner had "willfully" failed to file returns (See stipulation, Tr 76-77). To sustain its burden of proof on that issue, the government called two employees of the Internal Revenue Service, Powers (Tr 77-81) and Neuhauser (Tr 180-199). Both testified to conversations with petitioner during their investigation in which petitioner had acknowledged his failure to file returns and his awareness of his duty to file returns.

On cross-examination counsel for petitioner attempted to elicit other parts of the same conversations, in which petitioner had given reasons for his failure to file returns. Objections to this line of questioning were repeatedly sustained. Illustrative of the thrust of counsel's inquiry is this question put to Powers, to which the Court sustained objection:

> "And you asked him why he had not filed those returns, did you not?" (Tr 118.)

To preserve the record with respect to these rulings, petitioner offered to prove by cross-examination of the witness Powers that petitioner had said in the initial interview that he did not file because he did not have the money to pay the tax due, and subsequently he did not file because

of his fear of the possible consequences to himself. Petitioner further stated on that occasion that he was very concerned about the possible criminal aspects of his failure to file his income tax returns; he mentioned the possibility of suicide (Tr 319). Petitioner further stated that he was currently involved in a divorce suit with his wife, that joint income tax returns had been prepared for each of the years in question, and that the returns had been signed by his wife, who later removed her signature from the returns (Tr 320).

Petitioner offered to prove by the witness Powers that on July 2, 1969, petitioner had turned over copies of Forms 1040 for 1967 through 1968, signed by petitioner; that the 1964 return also bore the signature of petitioner's wife, who had inadvertently failed to remove her signature from that return as she had from others (Tr 338). At the same time, petitioner also produced a written statement explaining why he had failed to file his returns, setting forth additional information regarding the prior transfer of his residence to his wife, and containing a proposal by petitioner to pay his delinquent taxes at the rate of $400.00 or $500.00 per week (Tr 338).

Petitioner offered to prove by Neuhauser that in a conversation between himself and Neuhauser on November 4, 1969, petitioner had said that his attorney had told him that he was exposed to criminal prosecution for failing to file returns, and that the attorney was unable to advise a course of action which might eliminate the possibility of criminal prosecution. Petitioner said he had the returns in an envelope ready to be mailed, but could not bring himself to mail them because he did not know what course of action the government would take. He envisioned being arrested as soon as the returns were received by the government. Petitioner also stated at that time that, since his returns would have to be mailed without remittance,

the government would place judgments on the properties and jeopardize his business (Tr 341).

The Court refused these offers of proof.

The Court's charge to the jury with respect to the element of willfulness was as follows:

> "Now, it's not contended that the defendant—it is not contended that the defendant was—it is not contested, I should say, that the defendant was required by law to make a return for the year '65 and '66 and '67 charged in the information or that the returns for those years were not timely filed as required by the law. There is no contest as to that. Thus, there is only one factual question for you to determine in this case, only one; namely, whether the defendant's failure to file—failures to file were wilful.
>
> "Now, the word 'wilful' has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word 'wilful' means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.
>
> "The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.
>
> "The law does require proof of specific intent before the defendant can be convicted. Now, 'specific intent' means more than the general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent

may be determined by you from all of the evidence which has been submitted in this case.

"You are further instructed that the willfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that the defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the required filing date and, hence, have no intent to defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this is all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties."

Petitioner objected to this charge (Tr 429-434; 523-524).

A divided panel of the Court of Appeals filed an Opinion (App. A, *infra*) reversing the conviction on the grounds that the District Court had unduly restricted the scope of petitioner's cross-examination of the Internal Revenue Service agents and that the instructions had not properly defined the term "willfully", as defined in *United States* v. *Bishop,* 412 U.S. 346 (1973).

On rehearing *en banc* the Court held, *inter alia,* that the District Court had not erred in either respect found by the panel, and it affirmed the judgment of conviction (App. B, *infra*).

## REASONS FOR GRANTING THE WRIT

**1. The decision below is in conflict with a decision in another circuit in its interpretation of the Opinion of this Court in United States v. Bishop, 412 U.S. 346 (1973), and is erroneous in that respect.**

In *Bishop* the Court held that the term "willfully" has the same meaning throughout the heirarchy of federal tax offenses, I.R.C., 1954, §§7201-7207. The precise issue before the Court was the propriety of a lesser-included offense instruction in a prosecution under §7206(1), but in concluding that such an instruction was improper, the Court necessarily decided what the term means, not simply that it always has the same meaning:

> "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' *Murdock,* 290 U.S., at 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' *Spies,* 317 U.S., at 498, or knowledge that the taxpayer 'should have reported more income than he did.' *Sansone,* 380 U.S. at 353. See *James* v. *United States,* 366 U.S. 213, 221 (1961); *McCarthy* v. *United States,* 394 U.S. 459, 471 (1969).
>
> * * *
>
> "The Court's consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.
>
> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax mis-

demeanors that must be done 'willfully' the bad purpose or evil motive described in *Murdock, supra.*" 412 U.S. at pp. 360-361.

*Bishop* explicitly reaffirms the decision of this Court in *United States* v. *Murdock*, 290 U.S. 389 (1933), wherein it was squarely held that "willfully" in this context means something more than "voluntarily". *Murdock*, 290 U.S. at p. 394. It follows irresistibly from this that instructions which permit the jury to conclude that a defendant may be found guilty of "willful" misconduct if he merely acted knowingly or voluntarily are fundamentally erroneous.

Notwithstanding the force of this conclusion, post-*Bishop* decisions in the Ninth Circuit hold that instructions which permit such an inference are good. *United States* v. *Klee*, 494 F.2d 394 (9th Cir., 1974); *United States* v. *Hawk*, 497 F.2d 365 (9th Cir., 1974); *Cooley* v. *United States*, 501 F.2d 1249 (9th Cir., 1974).

The Court below has followed this approach in the instant case, for it is unquestionable that the instructions given by the District Court equate willfulness with mere knowledge of the obligation to file, coupled with a voluntary failure to do so. In that respect the instruction fails to distinguish breach of the civil duty to file from the willful failure to file defined by §7203.

We respectfully submit that, because of the importance of the willfulness requirement in tax prosecutions and the large number of such cases, this Court should clarify the meaning of the term so that district courts and courts of appeals may uniformly apply the proper interpretation.

The need for this Court to speak on the question is intensified by a recent Eighth Circuit case reaching a different conclusion. In *United States* v. *Pohlman*, ..... F.2d

..... (1975), printed in full as Appendix D to this Petition, that Court disapproved instructions on willfulness under §7203 very similar to those approved in this case, on the ground that they deprived defendant of her defense that she had failed to file because of pressing demands of her private and public life. *Pohlman* is the logical development after *United States* v. *Bengimina*, 499 F.2d 117 (1974), in which the Eighth Circuit held that "careless or reckless disregard of the law" does not constitute willfulness.

The co-existence of *Pohlman* and the Opinion of the Court below in the instant case, decided less than two weeks apart, to say nothing of the Ninth Circuit cases, has created a situation which cries out for this Court to exercise its unique authority. Even if the government should contend that *Pohlman* can be reconciled with this case, that contention should be considered in light of two facts: first, any attempt to reconcile these cases with each other, could not succeed in reconciling any of the decisions with *Murdock* and *Bishop*, which, it appears, are being incorrectly interpreted; second, public confidence in the fair administration of the tax laws may well be endangered by published reports that these cases are at variance. See *U. S. News & World Report*, April 7, 1975, "Tax Rulings", reprinted as Appendix E.

Therefore, we respectfully suggest that this Court should grant the writ on the grounds of public importance and existence of inter-circuit conflict.

**2. The decision below raises an important question with respect to the scope of cross-examination available to defendants in federal criminal prosecutions.**

The rulings of the District Court which limited petitioner's right to cross-examine government agents were upheld on the grounds that his statements to the agents were irrelevant and did not qualify or explain his admissions. Both these grounds are bottomed on the Court's view that proof of mere knowing and voluntary failure to file returns establishes the offense under §7203. Therefore, the issue can properly be treated as ancillary to Question 1 because it involves the same problem of interpreting "willfully".

Aside from this, we submit that the question is independently of great importance because of its general applicability to criminal cases in the federal courts. The effect of the decision is to restrict more severely than any case we know the right of a defendant to cross-examine his accusers. It permits the government to select the incriminating parts of lengthy interrogations—as happened here—while preventing the jury from hearing other parts which might dull the sting of what came out on direct.

This is in conflict with the general rule that a party has the right to bring out additional parts of a conversation which tend to explain or qualify the parts introduced by his opponent. *Home Benefit Assn.* v. *Sargent*, 142 U.S. 691 (1892). More importantly, in criminal cases, this restrictive rule deprives defendant of his fundamental and well-recognized right to establish defenses, particularly his defense to willfulness, by cross-examination of prosecution witnesses. *Beaudine* v. *United States*, 368 F.2d 417, 424-425 (5th Cir., 1966); *Haigler* v. *United States*, 172 F.2d 986, 988 (10th Cir., 1949).

Unless this Court intervenes, the Opinion below will stand as a precedent which invites emasculation of the right of confrontation by undue limitation of cross-examination.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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